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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 28.09.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.75 of 1992

1.Venkatachalam - D1
2.Saroja - D2
3.Akkammal - D3
4.Soundarammal - D4 ..
5. Sakunthala -D7

Appellants/Defendants 1 to 4 and 7

vs.

1.Nachayee Ammal - Plaintiff
2.Alamelu - D5
3.Pushpavathi - D6 ..

Respondents/Plaintiff/Defendants 5 and 6

Prayer: This Appeal has been filed against the Judgment and Decree dated 27.11.1991, passed in O.S.No.69 of 1990 on the file of the Second Additional Subordinate Court, Erode.

For Appellants : Mrs.R.Vijaya Shudha for Mr. K. Ravichandra Babu
For Respondents : Mr. M.M.Sundaresh (For R1)

For R2 and R3 : Given up

JUDGMENT

This appeal has been preferred u/s 96 CPC against the decree and judgment passed in O.S.No.69 of 1990 dated 27.11.1991 on the file of the Second Additional Subordinate Court, Erode. The suit is for partition and separate possession of plaintiffs' 2/9 share in the suit property.

2. The brief facts of the case of the plaintiff's in the plaint are as follows:-

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2(a) One Puchee Nayakkan had a son by name Gangama Nayakkan, who had two sons by name Nayuna Nayakkan and Muthusamy. The plaintiff is the wife of Muthusamy. Sixth Defendant is the daughter of the said Muthusamy through the plaintiff. Both Nayunda Nayakkan and Muthusamy pre-deceased their father Gangama Nayakkan. First Defendant is the son of Nayunda Nayakkan. Second Defendant is the daughter of Nayunda Nayakkan. Third Defendant is the wife of Nayunda Nayakkan. Gangama Nayakkan died on 17.7.1989. Fifth Defendant is the daughter of Gangama Nayakkan. Fourth Defendant is the kept mistress of Gangama Nayakkan. Seventh Defendant is the wife of first Defendant.

2(b) It is the case of the plaintiff that out of the joint family property income Gangama Nayakkan had purchased Ex.A.1 property and other properties which are scheduled as plaint Item No.1 and 2 and that after selling those properties he had purchased properties in the name of joint family. Plaint schedule properties are joint family properties. The plaintiff and Defendants were in joint possession and enjoyment of the plaint schedule property. After the death of Gangama Nayakkan and his son Muthusamy, plaintiff climes 2/9 share in the suit properties. It is the case of the plaintiff that the document executed by Gangama Nayakkan in respect of the suit properties are void documents because Gangama Nayakkan had no exclusive title or right over the suit properties since there are not self acquired properties of Gangama Nayakkan. The plaintiff had issued a notice on 10.01.1990 claiming partition of the suit properties. Since the Defendants were not amenable for an amicable partition, the plaintiff has filed this suit for partition.

2(c) Defendants 1 to 4 have filed a joint written statement contending that though Gangama Nayakkan had 2 ½ acres of land, it was lying fallow and there was no source of irrigation for the said land and it was never cultivated by Gangama Nayakkan and the allegation that the Gangama Nayakkan had purchased Ex.A.1 and other properties from out of the income derived from the joint family properties. The suit properties are not the joint family properties and the plaintiff enjoyed the suit properties along with Defendants in common. Gangama Nayakkan had executed settlement deed, will and other documents in respect of the property which he had acquired out of his own income. The suit properties are the self acquired properties of Gangama Nayakkan. Gangama Nayakkan's mother expired at the young age of Gangama Nayakkan. Puchee Nayakkan, the father of Gangama Nayakkan, married one Ellammal as his second wife. This forced Gangama Nayakkan to join in railways. On 1.3.1944 Puchee Nayakkan, the father of Gangama Nayakkan, had executed a settlement deed in respect of plaint Item No.2 property in favour of his grand sons

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Muthusamy and Nayunda Nayakkan when they were minors. Those properties were partitioned on 19.8.1976 between Defendant 1 and 6. The entire plaint Item No.2 property was allotted to the first Defendant. The plaintiff has also signed in the said partitioned deed as a witness. Hence, the plaintiff is estopped from contending that the Defendants have no right or title under the settlement deed executed by Gangama Nayakkan. Gangama Nayakkan had purchased the plaint schedule properties from out of his own income and also by raising loans. 2 ½ acres of land at Ramadevam Village was a puncha land and there was no income derived from those lands. The plaint schedule properties were never treated and enjoyed by the said Gangama Nayakkan as joint family property. Gangama Nayakkan treated the plaint schedule properties only as his self acquired properties. Gangama Nayakkan had conducted marriage for Defendants 5 and 6 by raising loan. The first item of the plaint schedule properties was purchased by Gangama Nayakkan on 1.1.1941 for a sum of Rs.1,500/-. From out of the loan raised under a promissory note and also under mortgage deed he had paid the sale consideration for the above said sale dated 1.1.1941. Fifty cents of land was settled by Gangama Nayakkan in favour of the fifth Defendant. On 17.1.1973 Gangama Nayakkan had executed a settlement deed in respect of other plaint schedule properties. The plaintiff cannot claim any right or title over the plaint item No.1 proeprty. Item No.3 to the plaint schedule property was settled in favour of the fifth Defendant as per the sale deed dated 29.4.1959. Even in the said document itself Gangama Nayakkan has described the said property as his self acquired property. In item No.3 to the plaint schedule property half of it was sold by the fifth Defendant on 12.6.1983 in favour of Sagunthala(D7) for Rs.26,300/- Fifth Defendant had executed another sale deed in favour of the third Defendant in respect of the remaining half of the 3rd item of the plaint schedule property for Rs.26,300/-. Defendants 7 and 3 have acquired title in respect of the item No.1 and 3 to the plaint schedule properties through the deeds mentioned above. The plaintiff has no right or title in respect of item No.3 of the plaint schedule properties. Item No.4 was bequeathed by Gangama Nayakkan under a will dated 17.1.1973 in favour of the Defendants 2 and 6. Plaint schedule item No.5 was purchased by Gangama Nayakkan on 14.6.1956 out of his own income for Rs.4,000/-. The said property was also settled in favour of sixth Defendant by Gangama Nayakkan. Sixth item of the plaint schedule property was purchased by Gangama Nayakkan on 13.4.1927 for Rs.100/-. The said property was settled in favour of the first Defendant on 6.4.1979 by Gangama Nayakkan. The first Defendant had constructed a house in the said property by spending Rs.1,30,000/-. These facts are well known to the plaintiff. The seventh item of the plaint schedule property was also purchased by Gangama Nayakkan on 20.9.1960 for Rs.700/- and the said property

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was settled in favour of the fourth Defendant-Sounthrammal by Gangama Nayakkan on 10.10.1960. Fourth Defendant is also in possession and enjoyment of the said property from the said date of settlement. The plaintiff's husband died in the year 1969. But the plaintiff has not filed any suit for partition even after a lapse of 20 years from the date of death of her husband. So far the plaintiff has not taken any steps to set aside the documents executed by Gangama Nayakkan.

2(d) Seventh Defendant in his written statement has contended as follows:

Item No.3 of the plaint schedule property was settled in favour of the fifth Defendant on 29.4.1959 by Gangama Nayakkan. From fifth Defendant seventh Defendant has purchased one half of the item No.3 property on 12.6.1983 for Rs.26,300/-. Remaining one half in plaint schedule item No.3 property was purchased by the third Defendant from fifth Defendant on 10.09.1983 for a sum of Rs.26,300/-. Hence, seventh Defendant is entitled to one half of the plaint schedule item No.3 property. So far the plaintiff has not taken any steps to set aside the above said sale deeds in respect of the plaint schedule item No.3 property.

3. On the basis of the above pleadings, the learned Sub-Judge has framed five issues and one additional issue and on the basis of the documentary and oral evidence, has come to a conclusion that the properties are joint family properties of Gangama Nayakkan and consequently decreed the suit as prayed for by granting preliminary decree for partition of plaintiff's 2/9 th share . Aggrieved by the findings of the learned sub-Judge, the Defendants 1 to 4 and 7 have preferred this appeal. Defendants 5 and 6 remain exparte.

4. Now the points for determination in this appeal are :

i) Whether the plaint schedule properties are self acquired properties of Gangama Nayakkan or the joint family properties of the plaintiff and the Defendants?

ii) Whether the plaintiff is entitled to 2/9 th share in all the plaint schedule items of properties?

5.The Point (i):-

5(a) The learned counsel appearing for the respondents would contend that the burden is on the Gangama Nayakkan and the Defendants, who claimed right under Gangama Nayakkan to prove that the plaint schedule properties were acquired from out of the earnings of Gangama Nayakkan. The

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learned counsel for the respondents would further contend that since the Defendants claim that the plaint schedule properties are self acquisition of Gangama Nayakkan, the burden is on them to show that the plaint schedule properties are not joint family properties, but they are self acquired properties of Gangama Nayakkan. The first Defendant was examined as D.W.1, who has admitted that Gangama Nayakkan was having 2 ½ acres of ancestral land at Ramadevam Village. According to the learned counsel, Gangama Nayakkan had purchased Ex.A.1 and A.2 properties only out of the income derived from the said 2 ½ acres of land which belong to the joint family of Gangama Nayakkan and his father Puchee Nayakkan.

5(b) Per contra the learned counsel for the appellant would contend that it is the admitted case of the plaintiff that Gangama Nayakkan was employed in railways and he was earning and only from out of the his earnings he had purchased Ex.A.1 and other properties. P.W.1 in his evidence has admitted in the cross-examination to the fact that Gangama Nayakkan was employed in railways even at his young age and that in the cross-examination P.W.1 has categorically would admit that he is not aware as to who had cultivated the land ad Ramadevam Village. P.W.1 further admitted that he does not know what was the income derived from the said joint family properties at Ramadevam Village. A perusal of Ex.A.1-sale deed will go to show that even at the time of execution of Ex.A.1 on 1.5.1941, Gangama Nayakkan was working as a points- man in the railways.

5(c) The learned counsel appearing for the respondents would contend that Gangama Nayakkan was getting only Rs.20 to Rs.30 per month and it was not possible for him to pay the sale consideration of Rs.1,500/- under Ex.A.1 from out of his earning through employment. But a reading of Ex.A.1 itself will go to show that out of the sale consideration of Rs.1,500/-, the sale consideration were adjusted towards previous loan obtained by Gangama Nayakkan from the vendor under Ex.A1. If the case of the plaintiff that Gangama Nayakkan was getting sufficient income from the joint family property it true, then there is no need for him to raise any loan from the vendor of Ex.A.1. Even in Ex.A.2-sale deed, it has been clearly stated that Gangama Nayakkan was working in railways as points-man and the said sale deed was executed by Gangama Nayakkan along with his minor sons. The fact that Ex.A.2-sale deed was executed by Gangama Nayakkan along with his minor children will not derive us to an inference that the plaint schedule properties were enjoyed as a joint family property. One pertinent point to be noted under Ex.A.2-sale deed is that if properties were enjoyed as a joint family property then in Ex.A.2 Gangama Nayakkan's father's name Puchee Nayakkan and brother Nayunda Nayakkan's name would have also been mentioend. The dictum in 1997(1) CTC 222 (Kannammal Vs. Chinnaponnammal) , 2006

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(3) MLJ 82 (Kothanramappa Vs. Thimmaiah and others) and 1996 MLJ 320 (Kandasami and another Vs. Adi Narayanan and others) would emphasis that the burden is on the Kartha of joint family to explain that the acquisition were made out of his separate funds. Admittedly Gangama Nayakkan is now no more. It is seen from the recitals in Ex.A.1 and evidence of P.W.1 and also recitals in Ex.A.2 would go to show that at the time of execution of Ex.A.1 and A.2-sale deeds Gangama Nayakkan was working as a points-man in railways. There is absolutely no evidence on record to show that Gangama Nayakkan was eking his livelihood only out of the income derived from the joint family properties of 2 ½ acres of land at Ramadevam Village. Even the sale consideration of Rs.1,500/- was not paid as a lumsum by Gangama Nayakkan, but the sale consideration was adjusted only towards pre-existing loan borrowed from the vendor of Ex.A.1. So the above said dictums relied on by the learned counsel appearing for the Defendants will not be applicable to the present facts of the case. Hence, I hold on the point (1) that the suit properties are only self acquired properties of Gangama Nayakkan.

6.The Point (ii):-

6(a) There are seven items of properties scheduled to the plaint. Item No.1 is 5.79 cents in S.No.52. This was purchased by Gangama Nayakkan under Ex.A.1-sale deed. In respect of this property Gangama Nayakkan had executed Ex.B.6-settlement dated 29.4.1959 in favour of Defendant 4. So far, neither the plaintiff nor her husband during his life time took any steps to set aside Ex.B.6-settlement. So item No.1 to the plaint schedule is not available for partition.

6(b) Item No.2 to the plaint schedule properties are 1.45 cents in S.No.36 and 4 cents in S.No.37A. In respect of Item No.2, the father of Gangama Nayakkan viz. Puchee Nayakkan had executed Ex.B.8-settlement in favour of the father of the plaintiff namely Muthusamy and Muthusamy's brother Nayunda Nayakkan while they were minors. Plaint Item No.2(a) is 'A' Schedule to Ex.B.8. Item No.2(b) is 'C' Schedule to Ex.B.8. So the claim of fifth Defendant under Ex.B.6-settlement deed dated 29.4.1959 cannot be sustained because as early as on 1.3.1944 itself the father of Gangama Nayakkan viz. Puchee Nayakkan had executed Ex.B.8 in favour of Plaintiff's father and his uncle.

6(c) Item No.2-plaint schedule property has subsequently been partitioned on 19.8.1976 between the sixth Defendant, the daughter of the plaintiff and the third Defendant, mother of 1st Defendant. The plaintiff has attested Ex.B.9-partition deed. Under such circumstances, plaintiff cannot claim any share in item No.2 to the plaint schedule properties.

6(d) So far as item No.3 is concerned it is in S.No.35A

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measuring 49 ½ cents out of 99 cents and under Ex.B.6-settlement deed Gangama Nayakkan had settled Item No.3 in favour of the fifth Defendant. So in respect of item No.3 also plaintiff cannot claim any rights

6(e) Item No.4 consists of two items of properties. 4 (a) is measuring 53 ¼ cents in S.No.26 and 4(b) is 50 cents in R.S.No.158/7. The said property was purchased by Gangama Nayakkan under Ex.B.13-sale deed dated 27.4.1955. Defendants 2 and 6 claim item 4 to the plaint schedule properties under Ex.B.7-will, but no attestor to Ex.B.7 was examined to prove the will. Neither second Defendant nor sixth Defendant had produced any document before the trial Court to show that they have right and title in respect of item No.4 to plaint schedule property. So item No.4 to the plaint schedule property is available for partition.

6(f) Item No.5 is 80 cents in R.S.No.156/2. Gangama Nayakkan had purchased the item No.5 to the plaint schedule property under Ex.B.14-sale deed dated 14.6.1956. Sixth Defendant claims right in respect of item No.5 under a settlement deed, but the said sale deed was not produced before the court. So item No.5 is also available for partition.

6(g) Item No.6 to the plaint schedule property consists four properties. Item No.6A measuring 1664 sq ft, 6B measuring 1034 sq ft, 6C measuring 2132 sq ft and 6D measuring 500 sq ft. The plaintiff has produced Ex.B.16-sale deed dated 3.4.1927 in favour of Gangama Nayakkan. Four boundaries mentioned in the plaint schedule for the above said property do not tally with the 4 boundaries for the property mentioned under Ex.B.16. The first Defendant claims this property under Ex.B.18-settlement deed dated 6.4.1979 i.e. in respect of Item No.6A measuring 1664 sq ft only. In respect of Items 6(b), 6(c) and 6(d) there was no document produced by either parties. What is scheduled to the plaint as Item No.6(a), 6(b), 6(c) & 6(d) are not the properties scheduled under Ex.B.18 because the boundaries do not tally. Under Ex.B.16 there are three items of properties mentioned. First item is a house and second item is a plot measuring half of 7 yards X 20 yards and third item is measuring half of 20 yards X 20 yards whereas measurement given under Ex.B.18-settlement deed for the properties mentioned therein are 1664 sq ft, 1034 sq ft, 500 sq ft total extent of 5332 + 12 cents of land. So the properties in item No.6 to the plaint schedule properties do not tally with the properties said to have been purchased by the Gangama Nayakkan under Ex.B.16. The plaintiff cannot claim partition in Item No.6 to the plaint schedule properties.

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6(h) According to the plaintiff, Item No.7 to the plaint schedule property was purchased by Gangama Nayakkan under Ex.B.19-sale deed. Survey No.37B measuring 20 cents is the item No.7 to the plaint schedule property, whereas the property purchased under Ex.B.19 by Gangama Nayakkan was 26 cents in S.No.37B. Fourth Defendant claims seven cents in item No.7 under Ex.B.20-settlement deed dated 10.10.1960 executed by Gangama Nayakkan in favour of the fourth Defendant. So far Ex.B.20 was not challenged by either by the plaintiff or by her husband Muthusamy during his life time. Under such circumstances, item No.7 to the plaint schedule property is also not available for partition. As the legal heir of Muthusamy, who is one of the sons of Gangama Nayakkan, the plaintiff is entitled to 1/3 share and after the death of Gangama Nayakkan the 1/3 of Gangama Nayakkan's share devolved on his two sons and one daughter Alemelu. So, the plaintiff's father Muthusamy would be entitled to 1/3 share + 1/3 of 1/3 (1/9) of Gangama Nayakkan's share which will come to 4/9 share i.e. 1/9 + 1/3. The plaintiff is having her daughter, the sixth Defendant. So out of this 4/9 share plaintiff and his daughter will be entitled to one half in 4/9 share that come to 2/9 share i.e., 4/9 + ½ = 4/18 = 2/9. So, the plaintiff is entitled to partition of his 2/9 share in plaint scheduled Item No.4 and 5 alone. The second point is answered accordingly.

7. In the result, the appeal is allowed partly. The decree and Judgment passed in O.S.No.69/1990 on the file of the Second Additional Sub-Court, Erode, is set aside and the plaintiff is entitled to a preliminary decree for partition of 2/9 share in plaint schedule properties item No.4 & 5 only. The mode of partition is relegated to the final decree proceedings.

ssv

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To

1. The II Additional Subordinate Judge,
Erode.

2. The Section Officer, VR Section, High Court
Madras

+ one cc to Mr. K. Ravichandra Babu, Advocate sr no. 46328

tej(co)
nm(19.12.2006)

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